

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Petition of ACS of Anchorage, Inc. Pursuant to
Section 10 of the Communications Act of
1934, as Amended, for Forbearance from
Sections 251(c)(3) and 252(d)(1) in the
Anchorage LEC Study Area

WC Docket No. 05-281

COMMENTS OF VERIZON ON ACS'S PETITION FOR FORBEARANCE

Of Counsel:
Michael E. Glover

Scott H. Angstreich
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Edward Shakin
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, VA 22201-2909
(703) 351-3099

Counsel for the Verizon telephone companies

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TABLE OF CONTENTS

	Page
I. SUMMARY	1
II. THE COMMISSION SHOULD MAKE CLEAR THAT ACS’S SHOWING IS NOT THE MINIMUM NECESSARY FOR GRANTING FORBEARANCE FROM UNE OBLIGATIONS.....	2
CONCLUSION	6
APPENDIX A	

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I. SUMMARY

ACS of Anchorage, Inc. ("ACS") has presented an overwhelming case that it is entitled to forbearance from the requirements of § 251(c)(3) and § 252(d)(1) in the Anchorage LEC Study Area ("Anchorage"). In granting this petition, however, the Commission should make clear that a showing such as ACS's does not establish a standard for what is necessary to satisfy the requirements of § 160. Simply put, the point at which forbearance is warranted occurs well before an incumbent local exchange carrier has lost more than 50 percent of its market share, as is the case with ACS in Anchorage, *see* Pet. 1-2. Any other result would be inconsistent with the statutory standards.

Moreover, the *Qwest Omaha Forbearance Order*² also squarely confirms that § 251(c)(3) "ha[s] been fully implemented" nationwide. 47 U.S.C. § 160(d). Accordingly, § 160(d) poses no bar to ACS's petition.

¹ The Verizon telephone companies ("Verizon") are identified in Appendix A to these comments.

² Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, FCC 05-170, WC Docket No. 04-223 (rel. Dec. 2, 2005) ("*Qwest Omaha Forbearance Order*").

II. THE COMMISSION SHOULD MAKE CLEAR THAT ACS'S SHOWING IS NOT THE MINIMUM NECESSARY FOR GRANTING FORBEARANCE FROM UNE OBLIGATIONS

As the Commission has recognized, forbearance is an “integral part” of the “pro-competitive, de-regulatory national policy framework” established in the 1996 Act.³ When presented with a forbearance petition, the fundamental question before the Commission is whether “market conditions” and “market forces” are sufficient to ensure that rates will be just and reasonable and that consumers will be protected in the absence of regulation, such that forbearance is in the public interest.⁴ Assuming the facts as alleged in their petition, ACS has easily satisfied its burden under that standard. *See, e.g.*, Pet. at 1-3, 5-6, 13-14, 16-17.

In granting ACS's petition, the Commission should make clear, consistent with its recent decision in the *Qwest Omaha Forbearance Order*, that ACS's showing here has far exceeded that necessary to obtain a grant of forbearance. *Cf. Qwest Omaha Forbearance Order* ¶ 2 (explaining that the Commission did not adopt “rules of general applicability”). The forbearance criteria — whether enforcement of the regulation is “necessary to ensure” that rates “are just and reasonable” and that “consumers” are “protect[ed],” and whether forbearance would “promote competitive market conditions” and is in the “public interest,” 47 U.S.C. § 160(a)-(b) — are satisfied long before competitors have captured a 50 percent market share in an area. The Commission and the D.C. Circuit have recognized the harm to the public interest and to competition from excessive unbundling. Most significantly, “excessive network unbundling

³ Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), et al.*, 19 FCC Rcd 21496, ¶ 11 (2004) (“271 Broadband Forbearance Order”) (internal quotation marks omitted), *petition for review filed, Earthlink, Inc. v. FCC*, No. 05-1087 (D.C. Cir.); *accord Qwest Omaha Forbearance Order* ¶ 13.

⁴ Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Personal Communication Industry Association's Broadband Personal Communications Services Alliance Petition for Forbearance*, 13 FCC Rcd 16857, ¶ 18 (1998).

requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology.”⁵ Indeed, in granting Qwest’s petition in part, the Commission expressly noted that unbundling’s costs “are unwarranted and do not serve the public interest once local exchange and exchange access markets are sufficiently competitive.” *Qwest Omaha Forbearance Order* ¶ 77.

As the Commission itself has recognized, the market may be sufficiently competitive to satisfy the statutory standards in § 160 before competitors have actually captured a market share of 50 percent or more. Indeed, the Commission recently acknowledged that even “market share calculations [that] indicate a high level of concentration” can “significantly overstate” a carrier’s market power.⁶ That is because market shares are a *backward*-looking measure of market power. Where, as here, markets are characterized by rapid technological or other changes, sound analysis of market power requires a *forward*-looking approach. Thus, in approving the combination of Verizon and MCI, the Commission recognized that, in determining the competitive impact of intermodal, facilities-based carriers, it is not necessary that all “consumers would be willing or able to substitute” the intermodal service for wireline service, “or even that [the intermodal service] be widely available.”⁷ Instead, the Commission required only “evidence

⁵ *E.g.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 3 (2003) (“*Triennial Review Order*”), *vacated in part and remanded*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir.) (“*USTA IP*”), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004); *see United States Telecom Ass’n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003) (“Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.”).

⁶ Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶¶ 103-104 (2005).

⁷ *Id.* ¶ 88 (facilities-based VoIP); *accord id.* ¶ 91 (wireless).

of *sufficient* substitution for significant segments of the mass market.”⁸ In other words, it is the existence — not the market share — of competitive substitutes that is sufficient to eliminate market power. Similarly, in granting Qwest’s petition for forbearance in part, the Commission relied on the fact that Cox was “capable of delivering” services to a certain percentage of customers, not that Cox had already obtained any particular market share. *Qwest Omaha Forbearance Order* ¶ 66; *see id.* ¶ 69.

Moreover, imposition of any market share test *at all* is inconsistent with the text of § 160, which does not contain such a test. In related circumstances, where “Congress specifically declined to adopt a market share or other similar test,” the Commission has refused to establish its own market-share test.⁹ This is also true in the context of UNEs, where the Commission expressly “decline[d] to determine impairment based on a certain level of retail competition because section 251(d)(2) requires us to ask whether requesting carriers are ‘impaired,’ not whether certain thresholds of retail competition have been met.” *Triennial Review Order* ¶ 114. And, when the Commission sought to establish a market share test in the context of a petition for forbearance from regulation as a dominant carrier, the D.C. Circuit rejected the Commission’s decision, noting that the Commission had in some cases “view[ed] market share as irrelevant” in that context and had “never viewed market share as an *essential* factor.” *AT&T Corp. v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001).

In addition, in the *Qwest Omaha Forbearance Order*, the Commission correctly “reject[ed] commenters’ proposals that [it] interpret and apply the section 251(c)(3) impairment

⁸ *Id.* ¶ 91 (emphasis added).

⁹ Memorandum Opinion and Order, *Application of Verizon New England Inc., et al., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, ¶ 235 (2001), *aff’d in part and remanded in part*, *WorldCom, Inc. v. FCC*, 308 F.3d 1 (D.C. Cir. 2002).

standard . . . to [the] forbearance analysis.” *Qwest Omaha Forbearance Order* ¶ 14 n.48. As the Commission explained, its “unbundling analysis does not bind [its] forbearance review.” *Id.* ¶ 63. Instead, the Commission’s “sole task,” in the context of a petition for forbearance from the requirements of § 251(c)(3), is “to determine whether to forbear under the standard of section 1[6]0,” and the Commission does not “issue comprehensive proclamations . . . regarding . . . non-impairment” in such a proceeding. *Id.* ¶ 14; *see also id.* ¶ 67 n.177 (explaining that, in reviewing a forbearance petition, the Commission is not “making national impairment findings,” but instead is “applying the statutory standards of section 1[6]0 in a specific geographic market”).

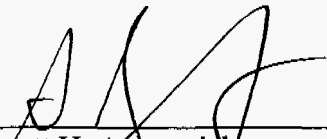
Finally, the Commission already has addressed any potential claim that forbearance is not available because section 251(c)(3) has not been “fully implemented” in Anchorage. 47 U.S.C. § 160(d). The Commission’s recent decision that “section 251(c) is ‘fully implemented’ for all incumbent LECs *nationwide*,” because “the Commission has issued rules implementing section 251(c) and those rules have gone into effect” has conclusively resolved that issue. *Qwest Omaha Forbearance Order* ¶ 53 (emphasis added).

CONCLUSION

The Commission should grant ACS's petition in a manner consistent with the foregoing comments.

Respectfully submitted,

Of Counsel:
Michael E. Glover



Scott H. Angstreich
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Edward Shakin
VERIZON
1515 North Courthouse Road
Suite 500
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Counsel for the Verizon telephone companies

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APPENDIX A

THE VERIZON TELEPHONE COMPANIES

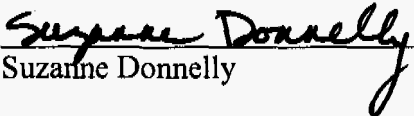
For the purposes of this filing, the Verizon telephone companies are the following local exchange carriers:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Southwest Incorporated d/b/a Verizon Southwest
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on the 9th day of January 2006, I caused a copy of the foregoing Comments of Verizon on ACS's Petition for Forbearance to be served upon the parties on the service list below by first-class mail, postage prepaid.

Karen Brinkmann
Elizabeth Park
Stefanie Alfonso-Frank
Latham & Watkins, LLP
555 11th Street, N.W.
Washington, D.C. 20004-1304


Suzanne Donnelly